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IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

WILLIAM MALLORY, *et al.*,
Petitioners,

v.

STATE OF OHIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the three preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), for establishing a claim of vote dilution involving multi-member districts for legislative elections under Section 2 of the Voting Rights Act are necessarily dispositive of all claims of vote dilution, and in particular those involving multi-member districts for judicial elections?

2. Whether it is proper, in evaluating a claim of vote dilution under Section 2 of the Voting Rights Act, to ignore the extent to which past racial discrimination, including official racial discrimination, in the political process and in such areas as housing, education, employment, and health has hindered participation by members of minority groups as candidates in the political process?

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REPLY BRIEF FOR PETITIONERS

The central issue raised in the petition for *certiorari* is what criteria should be applied to evaluate a challenge brought under Section 2 of the Voting Rights Act to elections in multi-member judicial districts. The Court reserved this issue both in *Chishom v. Roemer*, 501 U.S. 380, 402-03 (1991), and in *Houston Lawyers' Ass'n v. Attorney General*, 501 U.S. 419, 426-27 (1991). Because the issue is important and squarely raised in this case, petitioners urge that it be considered and resolved on the merits here.

In their opposition, respondents initially contend that this issue has not been raised below. *See* Opp. 7. This contention

is frivolous. In both the District Court and in the Court of Appeals, petitioners took the position that they met the preconditions that the Court set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), for establishing a claim of vote dilution involving multi-member districts for legislative elections. But petitioners *also* went on to make the *further* argument that other factors not part of the *Gingles* criteria — in particular, the extent to which past racial discrimination, including official racial discrimination, in the political process and in such areas as housing, education, employment, and health has hindered participation by members of minority groups as candidates in the political process — should be applied to establish a violation of Section 2. *See* Appellants' Proof Brief at 43-54 (filed in the Sixth Circuit on Apr. 23, 1998). This argument presents a clear challenge to the application of the *Gingles* criteria in judicial elections. The court below recognized that petitioners were mounting such a challenge when it noted that they had set forth "a series of arguments on appeal that are only tangentially related to the *Gingles* preconditions," and then proceeded to address those further arguments. Pet. App. 10a-11a. Thus the issues presented in the petition here were both presented *to* and decided *by* the court below.[1]

With respect to petitioners' arguments about whether the *Gingles* factors are even properly applied in a Section 2 case where it would be possible to create judicial "influence" districts, respondents concede in a footnote that "this Court has reserved ruling on whether these so-called "influence district" claims are cognizable in [Section 2] challenges." Opp. 7 n.6.

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[1] Respondents also stress that the trial court went beyond the *Gingles* factors to consider the "totality of the circumstances" and its concerns about potential remedies. *See* Opp. 9-10. Neither issue was discussed by the court below, however, *see, e.g.*, Pet. App. 12a ("it is unnecessary to address the class's contentions on this issue"), because it found the *Gingles* factors alone to be dispositive of a challenge brought under Section 2.

The parties thus agree on the significance of this point, which has been identified but not yet resolved by the Court. *See also Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994) (reserving the issue and the application of the *Gingles* factors in such circumstances); *Voinovich v. Quilter*, 507 U.S. 146, 156-60 (1993) (same); *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993) (same). In the ensuing discussion, respondents move directly to arguing their legal position on the merits at some length, which suggests that they do not view it as waived. *See* Opp. 8-9.[2]

In fact, there is no question here that the Court of Appeals treated the three *Gingles* preconditions, which were originally developed as a judicial gloss on the actual text of the statute, as rigid criteria that must be met before any Section 2 violation can be established. *See* Pet. App. 6a.[3] This severe limitation of the court's inquiry is unjustified as a matter of law and policy. *See, e.g.*, *Gingles*, 478 U.S. at 99 (O'Connor, J., concurring) ("a court should consider all relevant factors bearing on whether the minority group has less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" and "should not focus solely on the minority group's ability to elect representatives of its choice"); *Voinovich*, 507 U.S. at 158 (eventual recognition of

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[2] The court below did find that one argument made by petitioners — concerning the impermissible use of "anti-single shot" devices in judicial elections to dilute minority voting opportunities — was waived, and it therefore has not been presented here. *See* Pet. App. 13a.

[3] One point mentioned in petitioners' statement of the case (though unrelated to the questions presented), was the implausibility of the trial court's determination that certain courts do not satisfy the first *Gingles* criterion when other courts with the same territorial jurisdiction and similar numbers of judges did so, and corresponding legislative districts within those same boundaries are recognized as doing so. *See* Pet. 6-7. Aside from correcting a minor discrepancy in the numbers of judges, *see* Opp. 11-12, respondents do not rectify the implausibility.

influence-dilution claims will require the *Gingles* preconditions to be reconfigured and modified).

This narrow approach is even more unjustified as applied to judicial elections, for the Court has never determined that the *Gingles* preconditions are to govern as the controlling criteria in such cases. In the two decisions where the Court has held that Section 2 is applicable to judicial elections, it has reserved the issue of what criteria should be applied to evaluate the validity of such claims. *See Houston Lawyers' Ass'n*, 501 U.S. at 426-27; *Chishom*, 501 U.S. at 402-03. As the Court recognized, elected judges are candidates for office, but they are not simply "representatives" in every classic sense of the term, and their functions obviously differ from those fulfilled by legislators. *See id.* at 400-01; *see also id.* at 410-11 (Scalia, J., dissenting). Accordingly, there is more justification for taking into account other factors in evaluating Section 2 claims concerning judicial elections, such as those factors which are relevant to claims of influence-dilution. As discussed in the petition, *see* Pet. 15, 16, the consequences of the narrower approach are even more pronounced in judicial politics, where the conceded effects of pervasive racial discrimination in education and employment are magnified by various features endemic to judicial campaigns, including the substantial qualifications that must be satisfied before a person becomes eligible to seek a position on the bench.

For these reasons, the Court should take the opportunity in this case to resolve the unsettled question of what criteria are appropriate to govern Section 2 challenges to elections in multi-member judicial districts.

Respondents also take issue with the assertion that the Court of Appeals "ignored" petitioners' evidence, which the District Court credited, on the history of racial discrimination in Ohio in housing, education, employment, and health and how the effects of that discrimination and continuing disparities may

bear upon the participation of African-Americans as candidates for judicial office. *See* Opp. 16-18. Their concern is overblown. Petitioners expressly noted that the Court of Appeals did consider their contention that the District Court had improperly "disregarded testimony that Ohio's electoral system discourages minorities from running for office." Pet. App. 10a. Yet the Court of Appeals concluded that this alleged "chilling effect" could not support a Section 2 violation, based on evidence that certain African-American judicial candidates have recently succeeded in being elected to the bench. *Id.* at 11a. At a minimum, therefore, the court below downplayed or minimized such evidence, even if it did not ignore it altogether.

Petitioners' consistent argument on this point has been that the consequences of pervasive past discrimination against African-Americans in such areas of housing, education, employment, and health, coupled with the use of at-large judicial districts, has tended to result in their having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" in certain judicial elections in Ohio. 42 U.S.C. § 1973(b). It is thus an argument grounded in the plain language of the statute rather than any judicial gloss that has been placed on it in cases involving legislative elections. The District Court found that the vast extent of such past discrimination, which was unrebutted in this case, continues to be felt today in identifiable disparities between whites and African-Americans in "several socio-economic categories" that undoubtedly have repercussions for recruiting potential judicial candidates. Pet. App. 39a.

These effects are heightened in judicial elections, where the threshold qualifications definitely magnify the lingering effects of past racial discrimination in education and employment, as well as the continuing socio-economic disparities that the trial court acknowledged. *See* Pet. 16. In addition, the limited pool of eligible minority candidates is further restricted by other established features of at-large judicial elections in Ohio. *See* id.

at 17; Pet. App. 26a-28a, 29a. These facts tend to explain why only 4.6% of the elected state court judges in Ohio are African-American. *Id.* at 40a. Against these facts, the court below determined that certain African-American candidates have recently succeeded in gaining election to the bench. This fact, however, does not negate the likely inference, as petitioners have consistently urged, that the use of at-large judicial districts has created a "chilling effect" which discourages African-Americans from running for judicial office because of the widespread perception that they cannot win.

Moreover, this contention presents a valid claim under the Voting Rights Act. In *Gingles*, the Court observed that whenever "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representative," a proper claim lies under Section 2. 478 U.S. at 47. The Court more than once has cautioned the lower courts that "'the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim.'" *De Grandy*, 512 U.S. at 1007 (quoting *Voinovich*, 507 U.S. at 158). But it is just such a "mechanical" application of *Gingles* that the court below applied in this case. In essence, it held that if African-Americans can be shown to have prevailed in a few such races in recent elections, then it does not matter whether they have been generally discouraged from running in the vast majority of past elections. *See* Pet. App. 10a-11a. This approach cannot be squared with statements made elsewhere in *Gingles*, cautioning that where "a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim." 478 U.S. at 57 n.25.

Finally, respondents dispute petitioners' contention that the ruling below conflicts with decisions by other circuits. In particular, the Fifth Circuit has noted that "the lack of black candidates is a likely result of a racially discriminatory system."

McMillan v. Escambia County, 748 F.2d 1037, 1045 (5th Cir. 1984). In a later decision, the same court elaborated further that sparse or speculative data counsels for greater flexibility in applying *Gingles* to vote-dilution claims. *Westwego Citizens for Better Gov't v. Westwego*, 872 F.2d 1201, 1208-09 (5th Cir. 1989). It thus criticized the trial court for having rejected "the argument that black candidates 'don't run because they can't win' as a basis for considering evidence" from other sources. *Id.* at n.9. "To hold otherwise would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove." *Id.* Respondents note that the Fifth Circuit has since issued its decision in *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1071 (1994). *See* Opp. 20. But that decision does not, explicitly or implicitly, repudiate the holding of these prior decisions. Indeed, it squarely recognizes that where "any" factor tends to show "that past discrimination has affected [African-Americans'] ability to participate in the political process," a proper claim will lie under the Voting Rights Act. 999 F.2d at 866-67. As discussed above and more fully in the petition, the nature and requirements of Ohio judicial campaigns supply that factor in this case, but the court below refused to give any credence to this means of establishing a valid claim under Section 2.[4]

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[4] In addition, the *en banc* decision in *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995), though it did not repeat all of the same language from the panel ruling, did render the same holding on the point in question. *See id.* at 1539-41. Moreover, nowhere in that opinion did the court repudiate its previous holding that the causal nexus between persistent socio-economic disparities and a depressed level of political participation by members of a given minority group is one that can be assumed as a matter of law. *See United States v. Marengo County Comm'n*, 731 F.2d 1546 (11th Cir.), *appeal dismissed and cert. denied*, 469 U.S. 976 (1984).

On this point, therefore, the ruling below conflicts with the text of the Voting Rights Act and with decisions by other circuits. Once again, the Court should grant review here to clarify and resolve the proper approach to Section 2 claims in all cases involving at-large judicial districts.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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